

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CUAUHTEMOC AGUSTIN REYES et al.,

Defendants and Appellants.

G038778

(Super. Ct. No. 01WF2844)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING; NO CHANGE IN
JUDGMENT

It is ordered that the opinion filed herein on October 30, 2009, be modified as follows:

1. On page 7, delete the third sentence of the last paragraph, beginning with “Specifically, the officers asked an employee” and substitute the following new sentences:

Specifically, two officers asked an employee there if defendant had a postal box at the facility. The clerk answered affirmatively and produced Reyes’s paperwork for renting the box. When the officers inquired whether defendant had mail in his box, the clerk responded by physically checking the box, which was located a few feet away, and returning with three pieces

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part IIB., C., and D.

of mail, which she held in her hand to display — without opening them — to the officers

2. On page 8, in the first full sentence on the page, delete the word “letters” and substitute the word “items,” so the sentence reads:

The outside of the envelope of one of the items addressed to defendant indicated it was a bill from AT&T Wireless.

3. On page 8, in the first and second full sentences on the page, delete the word “Wireless” in each sentence.

4. On page 8, second sentence of the first new paragraph, delete the word “objective” and replace it with “objectively reasonable” and also delete the words “and reasonable” at the end of the sentence, so the sentence now reads:

The Fourth Amendment does not protect every subjective expectation of privacy, but rather only objectively reasonable expectations that society is prepared to accept as legitimate.

5. On page 8, delete the last two sentences of the first new paragraph beginning with “Here, the officers” and ending with “envelopes to the officers,” and substitute the following new paragraph:

We defer to the trial court’s express or implied factual findings if supported by substantial evidence, but independently apply constitutional principles to the trial court’s factual findings in determining the legality of the search under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) Defendant complains the police orchestrated a search of his private postal box, but the record supports the trial court’s implicit finding rejecting this claim. The officers did not search defendant’s postal

box or direct the clerk to reveal its contents. The lead officer testified at the suppression hearing that he did not ask the clerk “to open the mailbox and get the mail out” Rather, the clerk spontaneously displayed defendant’s envelopes to the officers. Accordingly, the record supports the conclusion there was no governmental intrusion into defendant’s postal box.

6. On page 8, first sentence of the second full paragraph, insert the words “Fourth Amendment” between the words “defendant’s” and “claim,” so the sentence now reads:

The Fifth Circuit Court of Appeals explained in *United States v. Osunegbu* (1987) 822 F.2d 472 (*Osunegbu*) why defendant’s Fourth Amendment claim fails.

7. On page 9, delete the first sentence of the first full paragraph, beginning with “The *Osunegbu* court concluded” and replace it with the following sentence:

The *Osunegbu* court concluded these circumstances prevented a reasonable expectation of privacy that an employee would not retrieve mail placed in a postal box, noting “the manner in which private postal facilities are run virtually necessitates that the manager be allowed to reenter a box and remove the contents.

8. On page 9, delete the first sentence of the last paragraph, beginning with “We perceive no basis” and substitute the following sentence:

We find *Osunegbu* persuasive and perceive no basis on which to distinguish it.

9. On page 10, delete the first sentence of the first full paragraph beginning with “True, the owner of the mail facility” and replace it with the following sentence:

True, the owner of the mail facility testified he considered mail to be delivered to the customer when placed in the customer’s box and that “[n]ormally we don’t, you know, show any mail to anybody unless we have a search warrant or some court papers, you know, that tells us to show it.”

10. On page 10, in the first full paragraph, delete “(See *People v. Glaser* . . . substantial evidence]” and replace it with the following citation:

(See *Glaser, supra*, 11 Cal.4th at p. 362 [reviewing court defers to trial court’s implied factual findings if supported by substantial evidence];

11. On page 11, delete the first sentence of the first full paragraph, beginning with “In any event, no evidence showed” and substitute the following sentence:

In any event, no evidence showed the mail facility promised or communicated to defendant a warrant-only policy or that an employee would never retrieve mail once delivered to his box.

12. On page 11, first sentence of the second paragraph, insert “, as he testified below, that” between the words “asserts” and “[h]e,” so the sentence now reads:

Defendant asserts, as he testified below, that “[h]e did not have any belief that the employees of the business would ever remove mail from the boxes or that law enforcement or anyone else could simply look at the mail in his box on request.”

13. On page 11, after the first sentence of the second full paragraph ending “mail in his box on request,” insert the following new sentence:

He also testified he believed only he, or whoever he provided his key to, could retrieve mail from his box, exclusive of any employees.

14. On page 13, at the bottom of the page and following the citation, “(*Darling, supra*, 210 Cal.App.3d at p. 914, fn. 2.)” — insert the following new sentences:

Defendant suggests the evidence was improperly admitted to establish his identity as one of the perpetrators, but the trial court’s comments, cited above, reveal the purpose was to prove defendant’s preparation and intent to “facilitat[e]” the kidnapping. Defendant’s failure to request a limiting instruction on the use of the evidence forfeits the issue.

These modifications do not change the judgment. The petition for rehearing is DENIED.

ARONSON, J.

WE CONCUR:

O’LEARY, ACTING P. J.

IKOLA, J.